



# Family First Coronavirus Response Act: The Deep Dive

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# Background

## Two types of paid leave under FFCRA

- Up to 2 weeks of **Paid Sick Leave** (PSL) where:
  - 1) Employee is subject to a COVID-19 federal, state or local quarantine order
  - 2) Employee is advised by a health care provider to self-quarantine due to COVID-19
  - 3) Employee is experiencing symptoms of COVID-19 and seeks medical diagnosis/testing
  - 4) Employee is needed to care for family member subject to COVID-19 quarantine order or recommendation per reasons 1 and 2 above
  - 5) Employee must care for child due to COVID-19 school or childcare closure
  - 6) Employee experiences substantially similar condition as may be specified by HHS secretary
- Up to 12 weeks of **Paid Family Leave** (PFL - first 2 weeks unpaid) if:
  - Employee must care for child due to COVID-19 school or childcare closure

# Employers Subject to Act

- Paid Sick Leave:  
Private employers with less than 500 employees and most governmental employers (regardless of size)
- Paid Family Leave:  
Private employers with less than 500 employees and most non-federal governmental employers (state and local public employers)

# Employees Eligible for Leave

- **Paid Sick Leave:**  
No minimum service or hours requirement; covers all employees beginning on day 1 of employment
- **Paid Family Leave:**  
All employees that have worked for employer for 30 days or more (or if rehired after layoff on 3/1/2020 and worked for employer previously for 30 days or more, on first day of employment)
- **No Hours Requirement - PT and FT**

## Employees Absent Prior to 4-1-2020

My employee displayed symptoms of COVID-19, sought testing and has been in doctor recommended self-quarantine while awaiting results. She has been off since March 25<sup>th</sup>.

Is she entitled to FFCRA paid sick leave?

- Not for March 25-March 31
- Beginning April 1, entitled to up to two weeks PSL for doctor recommended self-quarantine period (Reason 2)
- If tested and negative and returns to work on April 6, entitled to 2 days
- If tested and positive and out until April 9<sup>th</sup>, entitled to 6 days

# Documentation

## What documentation can/should I require before granting leave and to claim the tax credit?

- Employer should **require**:
  - **Name** of employee
  - **Dates** of leave requested or needed
  - **Reason** for leave (i.e., doctor recommended self quarantine or symptoms and seeking testing)
  - **Name** of doctor/medical provider seen by employee or recommending self-isolation (or identify of public authority issuing quarantine order)
    - Can request note, but not require note
- Keep documentation for **4 years**
- *Note*: Documentation slightly different for other types of leave – see below

## My employee has requested leave because her doctor says everyone should stay home for 2 weeks – can she get leave under Reason 2?

- Leave available if **health care provider** recommends self-quarantine because
  - Employee has COVID-19
  - Employee may have COVID-19
  - Employee is particularly susceptible to COVID-19
- **Generalized** recommendations to stay home would not qualify (i.e., all employees over 65 are not entitled to PSL)
- Similarly, employee's fear of/concern over COVID-19 is not sufficient to obtain FFCRA Paid Sick Leave

# Quarantine Orders

Our business is located in a state that is under a “stay at home” order, and our business must close under the terms of the order.

Are my employees entitled to FFCRA leave?

- **NO**, the reason the employees are not working is because the business is closed, not because of the stay at home order
  - **Stay at Home** order is only a quarantine order allowing FFCRA leave if order itself caused employee not to work, not results of order (business shutdown)
  - Same is true even if business could stay open but decides to close because business so slow



My business can remain open under the Stay at Home order, but several of my employees have requested leave, citing the stay at home order.

Do they get FFCRA leave?

- **No**, if business can stay open, employees are allowed to work under Stay at Home order
- Stay at Home order isn't preventing employees to work
- Although regulations provide a Stay at Home order can be a quarantine order, the causation element makes it difficult to see when a general Stay at Home order would ever support FFCRA Paid Sick Leave

# Care for an Individual under Quarantine or Self Quarantine (Reason 3)

**My employee has requested FFCRA paid sick leave, saying he needs to care for a relative who is under a quarantine order or a doctor's recommendation of self-quarantine. Is he entitled to leave?**

- Employee must identify **individual requiring care**, and **relationship** to employee (if not apparent)
- Other individual must be someone with a relationship with employee such that employee would be expected to care for the individual, i.e., close family member, roommate, parents, etc. Cousin Sally may not qualify
- Employer should ask for and document **name of the public authority** issuing quarantine order or **doctor** recommending self-quarantine

## Leave Due to Child Care

My employee has requested FFCRA because she needs to care for her child whose school/childcare is closed due to COVID-19. But her husband is home and he usually cares for children. Does she qualify?

- Employee only entitled to PSL and/or PFL to care for child if **no other suitable person is available** to care for child
- Employee must identify (and employer document) the child and child's age, the name of the school/place of care that is not available, and certify that no other suitable person is available to care for the child (**may ask for additional evidence re: school/place of care closed, such as copy of letter, email notice, website notice**)
- With respect to a request for leave to provide care for a **child older than 14** during daylight hours, a statement that special circumstances exist requiring the employee to provide care

**My employee has requested FFCRA PFL. His day care facility is open, but he is concerned his children should not be there, has chosen to keep the kids home and therefore can't work.**

- Employee only entitled to PSL and/or PFL to care for child if childcare is closed or not available due to COVID-19
- A voluntary decision to keep children home from child care would not qualify
- Employer could decide to pay, but does not qualify for tax credits

# Part-time/Variable Schedule Employees

**I have an employee who is normally scheduled to work 25 hours per week – is she entitled to PSL and PFS?**

- Yes, entitled to 25 hours per week of leave (total of 50 hours for PSL) and an additional 10 weeks of paid family leave at 25 hours per week

**What if my employee works just 8 hours per week (1 shift)?**

- Yes, entitled to 8 hours for each week of available leave

## My employee is seeking PSL under FFCRA. He works approximately 20 hours per week, but hours vary. How do I calculate the amount of PSL to which he is entitled?

- Under new regs/FAQs, calculate the amount of leave using a daily (every day, not just work day) average rather than a two week average
- [Daily average over the last six months] × 14 = PSL hours
- If employed less than six months, [average number of daily hours employer/employee agreed employee would work] × 14; if no such agreement [average number of hours employee has actually averaged per day over employment] × 14

## How do I calculate the number of hours that must be paid for each work day when my part-time variable hour employee takes PFL?

- Use similar method to determine average hours per workday which must be paid
  - Previous 6 month average of hours worked per workday
  - Average work day hours agreed upon at hire
  - Average work day hours over entire period of employment
- As an alternative, the amount of pay may be computed in hourly increments instead of full days
  - May work better if employee using intermittently

# Intermittent Leave

My employee wants to take PSL and if needed, PFL on an intermittent basis, i.e., 2 days a week. Is this allowed?

- Employee **teleworking**: Either PSL or PFL may be taken intermittently if employer and employee agree
- Employee working at **work site**: PSL taken to care for a child or PFL may be taken intermittently if employer and employee agree
  - PSL taken for other 4 reasons may not be taken intermittently; inconsistent with purpose of leave which is to avoid spread of COVID-19



- Only amount of leave taken is counted towards leave entitlement; if my employee takes 10 hours a week of Paid Family leave each week, using 25% of a workweek
- Employers and employees encouraged to work cooperatively to come up with best solution
- DOL recommends arrangements be documented in writing

# Small Employer Exception

**My company has 25 employees. Do we have to comply with FFCRA?**

- **YES**, with respect to Paid Sick Leave Reasons 1-4 (other than for child care); no exception
- Employers with less than 50 employees may qualify for an exception with respect to Paid Sick Leave taken for child care purposes and Paid Family Leave

- Officer of Company must determine:
  - Providing PSL (for child care) or PFL would result in expenses and financial obligations exceeding revenues and cause company to cease operating at a minimal capacity; or
  - The absence of employee(s) requesting leave would create substantial risk to financial/operational capabilities of company because of employee's special skills, knowledge, or responsibilities; or
  - There are not sufficient workers who are able, willing and qualified and who will be available to perform the labor or provide the services provided by the employee seeking leave, and labor or services needed for business to operate at a minimal capacity

- Exemption is on an **employee by employee basis**, based on who is requesting leave; not for company as a whole
  - Leave could be allowed for one employee but not another
- Company **retains** documentation supporting assertion of the exemption – do not submit documentation anywhere

# Paid Family Leave and Substitution of Other Paid Leave

My employee is taking Paid Sick Leave to care for a child, which is paid at 2/3 of the regular rate. He wants to utilize his existing PTO allowance to supplement FFCRA paid leave to reach 100% of his salary. Is this allowed?

- Employee can supplement PSL with existing paid leave if both employer and employee agree

Can I require my employees on Paid Family Leave to use other paid leave to supplement wages and run concurrently with Paid Family Leave?

- It appears that either employee or employer can unilaterally require (initial confusion on this clarified by amended regs)
- Tax credit only for FFCRA required amounts

# Paid Family Leave and regular FMLA

**An employee is asking for Paid Family Leave. This employee used 8 weeks of FMLA several months ago. Is she entitled to 12 weeks of Paid Family Leave?**

- Employee only entitled to a maximum of 12 weeks of Paid Family Leave and regular FMLA use in each 12 month period
- If employee's earlier use of FMLA was in the same FMLA year as request for Paid Family Leave, only has 4 weeks left of Paid Family Leave
- *Note:* Regardless of when FMLA runs, employee only has a total of 12 weeks of Paid Family Leave available from 4/1/20 – 12/31/20

# Health Care Provider Exemption

**Are aides and administrative employees “health care providers” that can be excluded from FFCRA requirements?**

- Regulations provide a very broad definition of health care provider for determining what health care provider employees can be excluded from FFCRA requirements
- **Health care provider** includes anyone employed at a doctor’s office, hospital, health care center, clinic, medical school, health department, retirement facility, nursing home, home health provider, lab or medical testing facility, pharmacy or other similar facility; anyone employed by a company supporting the above institutions, anyone employed by an entity that provides medical services or makes medical products . . . .

- *Note:* definition of health care provider much narrower for purposes of who can advise an employee to self-quarantine
- **Emergency responders** can also be exempted, and definition is similarly very broad



# Non-enforcement Provisions

**FFCRA is complicated! What if I get it wrong – will the DOL give me an opportunity to fix the problem without repercussions?**

- DOL announced a 30 day “non-enforcement period”, but regulations make clear that the 30 days runs from the date FFCRA was passed, so from March 18-April 17

# IRS Tax Credits

The amount of PSL and PFL our company will pay in wages over the next two months is expected to exceed our entire federal employment tax bill. Do we get money back?

- **YES**, if amount of wages paid for PSL and PFL exceeds company employment tax bill, company can request an advance refund using IRS Form 7200
  - IRS has said it will start processing these requests in April 2020
  - <https://www.irs.gov/forms-pubs/about-form-7200>
- *Note:* Only private employers get tax credit; Not public employers

## What components of wages/benefits are included in calculating the amount of the tax credit for Paid Leave our company can claim?

- Employer can seek a **tax credit** equal to
  - the Paid Leave wages (Hours taken X Regular Rate or 2/3 of Regular Rate subject to caps)
  - Employer's share of Medicare taxes imposed on those wages
  - Allocable cost of maintaining health insurance coverage during the sick leave period (qualified health plan expense)
- Employer does not owe social security taxes on Paid Leave wages

# Qualified Health Plan Expenses

- **Pro Rata portion** of the expense based on period of leave
  - Amount of qualified health plan expense includes both the portion of the cost paid by employee and employer
  - Includes cost of **HRA** or **FSA** participant (but not QSHERA or HSA contribution)
  - **Fully Insured Group**: use COBRA applicable premium cost for that employee or create an average premium rate for all employees
    - Create daily rate by taking annual premium for employee divided by number of work days in the year
    - Calculations for part-time or seasonal employees should be adjusted as appropriate
    - Use daily rate for number of days of leave

- **Self-Insured employer** may use any reasonable method including:
  - COBRA applicable premium for the particular employee
  - Any reasonable actuarial method to estimate annual expenses of plan
- If use COBRA premium, presumably would create daily rate similar to insured plan
- If use actuarial method, create daily cost as follows: [total plan expense divided by number of employees] divided by average number of work days
- To calculate cost of **FSA** or **HRA**, use amount of contributions made on behalf of a particular employee and create daily rate

# Payroll Tax Deposits

**My company has paid FFCRA paid leave benefits and expects a hefty credit at the end of the second quarter. But I owe a payroll tax deposit now!**

- Employer who has paid qualified paid sick or family leave wages may reduce payment of future federal employment tax deposits without being subject to a penalty
- Do not have to pay deposit and then take credit upon quarterly filing



Questions?

# Resources

- <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>
- <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>